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OCT 29 1981
ALEXANDER L. STEVAS,
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No. 81-202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Petitioners,

v.

CLAIBORNE HARDWARE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Mississippi

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The judgment of the Mississippi Supreme Court in this case imposes prior restraints on political boycott activity and punishes concededly lawful political expression by imposing liability in damages. In their Opposition, Respondents have attempted to sidestep the serious First Amendment questions raised by that judgment. They begin with an argument on jurisdiction that is frivolous,[1] and then misstate the holding of the court below and

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[1] Respondents argue that the Petition was not timely filed in this Court. They claim that the petitions for rehearing timely filed in the court below did not operate to toll the time for filing in this Court "as to issues not included therein," *i.e.*, in the petition for rehearing. Opp. 10. As revised months before the decision below, Sup. Ct. R. 20 tolls the time for filing "for all parties" when a

ignore the governing First Amendment principles long established by this Court.

1. As Respondents now admit, the basic theory of liability imposed by the Mississippi Supreme Court is that black citizens in Claiborne County formed a common law "conspiracy"—a "partnership where one acts for all and where even innocent protected acts are a step in a criminal plot." Opp. 21. They do not contend that the "conspiracy" involved a common adherence to violence. Rather, the theory of Respondents—and the Mississippi Supreme Court—is that an actionable "conspiracy" is established simply by proof of joint adherence to the political goals of the Claiborne County boycott. *See* Opp. 20 & n.31. Anyone who adhered to those goals was not only deemed a partner to any unlawful acts of others (who may have been completely unknown to him), but also held liable in tort for any lost trade occasioned by purely lawful First Amendment activities. As the Fifth Circuit properly observed in this very case, *Henry v. First National Bank*, 595 F.2d 291, 303 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), that theory

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rehearing petition is timely filed "by any party in the case." *See also* Supreme Court Rules: The 1980 Revisions 16 (E. Gressman & R. Stern 1980). Here, both Petitioners and Respondents filed timely rehearing petitions, each of which operated to suspend the running of time in which to file a Petition.

The rule advocated by Respondents—which would make certiorari petitions due at one time on some issues and at another on other issues—is absurd on its face and flatly inconsistent with Rule 20. Respondents cite no authority to support an issue-specific rule of timeliness. In *Conboy v. First Nat'l Bank*, 203 U.S. 141 (1906), upon which they purport to rely, the petition for rehearing was not filed in the lower court until after the time in which review by this Court would otherwise have been due. *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942), did not involve a rehearing petition, but a procedural motion that "did not seek to have the [lower court] reconsider any question decided in the case"; moreover, as the discussion in *Pink* makes clear, a petition for rehearing that asks for reconsideration of "any question decided in the case" suffices to toll the time to seek review in this Court. *Id.*

of liability does not give adequate weight to the First Amendment's guarantee of the rights of political expression and association.[2]

2. Respondents' cavalier assertion that the injunction is "not before this Court" (Opp. 11) does not comport with the facts. The grant of the injunction was specifically assigned as error below, and Petitioners in their briefs urged the dissolution of the chancellor's entire decree. As we have noted (Pet. 8 n.8), Petitioners used the word "moot" in connection with the injunction only in their argument to the Mississippi Supreme Court that any proceeding on remand should be at law rather than in equity. The argument was that, because the boycott was then inactive, there was no longer any need or basis for granting injunctive relief as a matter of state law. The injunction issue is not moot. The injunction stands, and it will operate permanently to restrain the exercise of Petitioners' First Amendment rights if left unreviewed by this Court. Also, as explained in the Petition, Petitioners sought rehearing on this very point.

3. Respondents' effort to invoke *Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), as the "controlling authority" in this case (Opp. 10), fails utterly. First, *Meadowmoor* expressly deals only with "the power of the states to prevent future coercion," 312 U.S. at 296, and has no application to the question of how to apportion damage liability. More-

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[2] Respondents claim that they "are not politicians" and that this is therefore "not a political boycott." Opp. 18. As the Fifth Circuit has held, Petitioners' efforts to integrate government institutions, schools, and other facilities in Claiborne County involved "essential political speech lying at the core of the First Amendment." *Henry, supra*, 595 F.2d at 303. In any event, these "small-town merchants" (Opp. 2) in fact include a number of the leaders of the community in 1966—a member of the Board of Aldermen, a representative to the state legislature, a city attorney, and three members of an *ad hoc* committee appointed by the mayor to meet with black citizens to discuss some of the very demands for political reform at issue in this case.

over, *Meadowmoor* applies only upon the specific finding that an injunction limited to the prohibition of unlawful conduct would not have been effective to prevent future outbursts of violence. *See Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 139 (1957). There is no finding to that effect by either the chancellor or the Mississippi Supreme Court, nor could there have been on this record. Rather, the court below enjoined speech that was concededly lawful because of the mere *presence* of unlawful activity during the boycott: "If any of these factors—force, violence, or threats—is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other." App. A at 23a. That extraordinary, and erroneous, standard finds no support in *Meadowmoor* or in any other case.

4. Respondents' characterization of the boycott as a "reign of terror" (Opp. 12) is ludicrous to anyone who has reviewed the testimony. Respondents' appendix of citations to allegedly violent "incidents" in the record is shockingly misleading. Cited therein are references to attacks by white persons against black persons,[3] events characterized as "threats" that actually involved nothing more than requests not to patronize stores, and testimony probative of nothing whatsoever.[4] In fact, the isolated acts of violence or vandalism that did occur during the

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[3] Respondents cite, for example, the killing of a black man at his home by Port Gibson police and subsequent shootings into the First Baptist Church and beatings of one of the defendants ("incidents" 16 and 22).

[4] Consider, for example, Respondents' "incident" 45, which they have labelled "Johnny Cox incident at filling station." The cited evidence consists *entirely* of the following testimony by Police Chief Porter:

> "Q. Did you ever investigate any complaint, official complaint, made by Johnny Cox with regard to an incident at a filling station?
>
> "A. No, sir." R. 2100.

three-year period of the boycott were few in number and, for the most part, completely unconnected to the boycott.

CONCLUSION

For the reasons stated above and in the Petition, Petitioners pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Mississippi in this case.

Respectfully submitted,

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